

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

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11 MARK AND LINDA FRANTZICH, ) Case No.: 11-CV-00317-LHK  
12 v. )  
13 BARCLAY'S CAPITAL, ET AL., ) ORDER GRANTING DEFENDANTS'  
14 Defendants. ) MOTION TO DISMISS WITH LEAVE  
 ) TO AMEND AND DENYING  
 ) DEFENDANTS' MOTION TO STRIKE  
 ) AS MOOT  
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16 Plaintiffs Mark and Linda Frantzich have asserted two state law claims in connection with  
17 the default and foreclosure proceedings on property located at 1443 Longmeadow Drive, Gilroy,  
18 California. Specifically, Plaintiffs bring suit for: (1) declaratory relief with respect to their rights  
19 and duties under the deed of trust in foreclosure proceedings; and (2) for "unfair business  
20 practices" under the California Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200.  
21 Defendants are Barclay's Capital Real Estate, Inc. d/b/a HomEq Servicing ("HomEq"); Securitized  
22 Asset Backed Receivables LLC Trust 2007-BR2 ("SABR"); Ocwen Loan Servicing, LLC  
23 ("Ocwen"); and Deutsche Bank National Trust Company. Presently before the Court are  
24 Defendants' motion to dismiss and motion to strike portions of the complaint. Pursuant to Civil  
25 Local Rule 7-1(b), the Court deems Defendants' motions appropriate for resolution without oral  
26 argument. For the reasons discussed below, Defendants' motion to dismiss is GRANTED WITH

1 LEAVE TO AMEND. Defendants' motion to strike is DENIED AS MOOT. The April 21, 2011  
2 motion hearing and case management conference are vacated.

### 3 I. BACKGROUND

4 Plaintiffs are the owners of property located at 1443 Longmeadow Drive, Gilroy, California  
5 (the "Property"). Compl. ¶ 4. On November 24, 2006, Plaintiffs executed a Deed of Trust, and  
6 also executed an "Adjustable Rate Rider" and a "Prepayment Rider." *Id.* at ¶ 5. The Deed of  
7 Trust, which is attached as Exhibit A to Plaintiffs' Complaint, identifies Plaintiffs as the borrowers,  
8 Ameripath Mortgage Corporation as the lender, Service Link as the trustee, and Mortgage  
9 Electronic Registration Systems, Inc. ("MERS") as the beneficiary. *See* November 24, 2006 Deed  
10 of Trust, attached as Exh. A. to Pl.'s Compl. The Deed of Trust references a promissory note for  
11 Plaintiffs' \$480,000 loan on the Property. In addition, and as Plaintiffs' expressly acknowledge in  
12 their Complaint, the Deed of Trust included a power of sale provision for the trustee. Compl. ¶ 7  
13 ("The Deed of Trust granted and conveyed to the Trustee, in trust, the power of sale over the  
14 subject property."). However, Plaintiffs now allege that they never received copies of the closing  
15 documents and are "unaware of the existence of any Note." *Id.* at ¶ 12. On July 14, 2010,  
16 foreclosure proceedings were initiated, and Plaintiffs were sent a Notice of Default. *See* July 14,  
17 2010 Notice of Default, attached as Exh. C to Pl.'s Compl. The Notice of Default states that, as of  
18 July 13, 2010, Plaintiffs were in arrears \$35,086.08 on the loan.

19 Despite allegations that they are unaware of the existence of any Note, Plaintiffs also allege  
20 that "[f]or almost three years after closing the loan, the Frantzichs made their payments on time."  
21 *Id.* at ¶ 18. By late 2009, Plaintiffs fell behind on their loan payments and sought loan  
22 modification. *Id.* at ¶ 20. Plaintiffs allege that their original loan servicer, HomEq, denied them a  
23 loan modification in May 2010 on the basis that they were ineligible for a modification. *Id.* at ¶ 23.  
24 They further allege that in November 2010, Ocwen, Plaintiffs' loan servicer as of August 2010,  
25 denied their application for a loan modification on the ground that the modification did not "meet  
26 the net present value (NPV) test." *Id.* at ¶ 28. Ocwen offered to let Plaintiffs dispute the NPV  
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1 calculation if the Plaintiffs were willing to disclose additional financial information. *Id.* Plaintiffs  
2 were reluctant to disclose more information, and declined that offer. *Id.* at ¶ 29.

3 Plaintiffs filed suit in Santa Clara County Superior Court on January 5, 2011. On January  
4 6, 2011, the Superior Court granted Plaintiffs' motion for a temporary restraining order to enjoin  
5 the sale of the Property. *See* Defs.' Notice of Removal. As of the date of this Order, there is not a  
6 pending foreclosure sale. Defendants removed the case to federal court on January 21, 2011 on the  
7 basis of diversity jurisdiction. The case was reassigned to the undersigned on January 28, 2011.

## 8 II. LEGAL STANDARDS

### 9 A. Motion to Dismiss

10 Dismissal under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim is  
11 "proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to  
12 support a cognizable legal theory." *Shroyer v. New Cingular Wireless Services, Inc.*, 606 F.3d 658,  
13 664 (9th Cir. 2010) (quoting *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)). In considering  
14 whether the complaint is sufficient to state a claim, the court must accept as true all of the factual  
15 allegations contained in the complaint. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). However,  
16 the court need not accept as true "allegations that contradict matters properly subject to judicial  
17 notice or by exhibit" or "allegations that are merely conclusory, unwarranted deductions of fact, or  
18 unreasonable inferences." *St. Clare v. Gilead Scis., Inc. (In re Gilead Scis. Sec. Litig.)*, 536 F.3d  
19 1049, 1055 (9th Cir. 2008). While a complaint need not allege detailed factual allegations, it "must  
20 contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its  
21 face.'" *Iqbal*, 129 S.Ct. at 1949 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570  
22 (2007)). A claim is facially plausible when it "allows the court to draw the reasonable inference  
23 that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S.Ct. at 1949.

24 If the court concludes that the complaint should be dismissed, it must then decide whether  
25 to grant leave to amend. "[A] district court should grant leave to amend even if no request to  
26 amend the pleading was made, unless it determines that the pleading could not possibly be cured

1 by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (quoting *Doe*  
2 *v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)).

3 **B. Documents Considered by the Court**

4 A court may take judicial notice of facts that are not subject to reasonable dispute and are  
5 either: 1) generally known within the territorial jurisdiction of the trial court; or 2) capable of  
6 accurate and ready determination by resort to resources whose accuracy cannot be reasonably  
7 questioned. Fed. R. Evid. 201(b). The Court may consider, under the incorporation by reference  
8 doctrine, documents that are connected to the loan transaction at issue, as to which both Plaintiffs  
9 and Defendants make unopposed requests for judicial notice. *See United States v. Ritchie*, 342  
10 F.3d 903, 907 (9th Cir. 2003). For purposes of ruling on a motion to dismiss under Rule 12(b)(6),  
11 the pleadings are deemed to include “documents whose contents are alleged in a complaint and  
12 whose authenticity no party questions, but which are not physically attached to the pleading.” *See*  
13 *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998).

14 Here, the Court takes judicial notice of two documents: 1) Plaintiffs’ executed Deed of  
15 Trust which is dated November 24, 2006, and which was publicly recorded in the Office of the  
16 Santa Clara County Recorder on December 1, 2006; and (2) the Notice of Default, which was  
17 publicly recorded in the Office of the Santa Clara County Recorder on July 14, 2010. Both  
18 documents are attached to Plaintiff’s complaint, and both documents are central to Plaintiff’s  
19 causes of action.

20 **III. DISCUSSION**

21 Defendants move to dismiss on the grounds that neither of Plaintiffs’ two causes of action  
22 states a claim for which relief may be granted. The Court considers each cause of action in turn.

23 **A. Declaratory Relief under California Code of Civil Procedure § 1060**

24 Although Plaintiffs frame the “declaratory relief” section of their complaint as a cause of  
25 action, it is correctly understood as a form of relief. *See Davenport v. Litton Loan Servicing, LP*,  
26 725 F. Supp. 2d 862, 880 (N.D. Cal. 2010). Plaintiffs’ *actual* claim is based on an ultimately  
27 mistaken theory that Defendants lack the power to foreclose on the Property pursuant to the Deed  
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1 of Trust without production of the note. As courts have repeatedly emphasized, such a theory is  
2 “unsupported and incorrect.” *See id.*; *see also Hafiz v. Greenpoint Mortg. Funding*, 652 F. Supp.  
3 2d 1039, 1043 (N.D. Cal. 2009) (“California law does not require possession of the note as a  
4 precondition to non-judicial foreclosure under a deed of trust . . . Pursuant to section 2924(a)(1) of  
5 the California Civil Code the trustee of a Deed of Trust has the right to initiate the foreclosure  
6 process.”). This is because the trustee, if granted the power of sale, has the authority and duty to  
7 initiate foreclosure proceedings on the subject property upon the trustor’s default. *See Lomboy v.*  
8 *SCME Mortg. Bankers*, 2009 U.S. Dist. LEXIS 44158, \*12 (N.D. Cal. May 26, 2009) (“The trustee  
9 has the power and the duty to initiate foreclosure proceedings on the property upon the trustor’s  
10 default, resulting in a sale of the property.”).

11 Here, although Plaintiffs allege they are currently unaware of their rights absent production  
12 of the note, Plaintiffs refer to each of the Defendants in their capacities as lenders, servicers and  
13 trustees and do not challenge the existence of the Deed of Trust. In fact, Plaintiffs attached the  
14 November 24, 2006 Deed of Trust, which included a power of sale provision in the event of  
15 default, to their complaint. In these circumstances, the Deed of Trust provides Defendants the  
16 authority to initiate foreclosure proceedings in the event of default and the authority to sell the  
17 Property even without the note. *See, e.g., Alvara v. Aurora Loan Servs.*, 2009 U.S. Dist. LEXIS  
18 50365, \*18 (N.D. Cal. June 15, 2009) (“Under California law, a trustee need not possess a note in  
19 order to initiate foreclosure under a deed of trust.”); *see also Gomes v. Countrywide Home Loans,*  
20 *Inc.*, 192 Cal. App. 4th 1149, 1155 (Cal. App. 4th Dist. 2011) (dismissing declaratory relief action  
21 because, under California law, “a trustee, mortgagee, or beneficiary, or any of their authorized  
22 agents’ may initiate the foreclosure process. However, nowhere does the statute provide for a  
23 judicial action to determine whether the person initiating the foreclosure process is indeed  
24 authorized, and we see no ground for implying such an action.”).

25 Accordingly, to the extent Plaintiffs seek declaratory relief on the ground that Defendants  
26 may not initiate foreclosure proceedings without production of the note, Plaintiffs’ declaratory  
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1 relief cause of action is dismissed. Plaintiffs, however, are given leave to amend to allege specific  
 2 facts identifying their entitlement to declaratory relief on an alternate theory, if appropriate.<sup>1</sup>

3 **B. Unfair Business Practices under California Business & Professions Code § 17200**

4 In their second cause of action, Plaintiffs aver that Defendants engaged in unfair or  
 5 unlawful business practices in violation of California's Unfair Competition Law ("UCL"). *See*  
 6 Cal. Bus. & Prof. Code § 17200 (prohibiting "unlawful, unfair or fraudulent" business practices).  
 7 California's UCL prohibits acts or practices that are: (1) fraudulent; (2) unlawful; or (3) unfair. *Id.*  
 8 Each prong of the UCL constitutes a separate and distinct theory of liability. *See Kearns v. Ford*  
 9 *Motor Co.*, 567 F.3d 1120, 1127 (9th Cir. 2009). Under the "unlawful" prong, the UCL  
 10 incorporates other laws and treats violations of those laws as unlawful business practices  
 11 independently actionable under state law. *See Chabner v. United Omaha Life Ins. Co.*, 225 F.3d  
 12 1042, 1048 (9th Cir. 2000). Under a "fraud" theory, a plaintiff must show that "members of the  
 13 public are likely to be 'deceived'" by the defendant's practices. *See In re Tobacco II Cases*, 46  
 14 Cal. 4th 298, 312 (2009). Where a plaintiff alleges that the defendant failed to disclose material  
 15 facts, he or she must first establish that the defendant had a duty to disclose those facts. *See*  
 16 *Berryman v. Merit Prop. Mgmt., Inc.*, 152 Cal. App. 4th 1544, 1557 (2007) ("Absent a duty to  
 17 disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL.").  
 18 Under the "unfair" prong, "[a] business practice is unfair within the meaning of the UCL if it  
 19 violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and  
 20 causes injury to consumers which outweighs its benefits." *See McKell v. Wash. Mut., Inc.*, 142  
 21 Cal. App. 4th 1457 (2006).

22 Here, Plaintiffs argue broadly that Defendants engaged in "deceptive, unfair, and other  
 23 wrongful conduct" with respect to the denial of their loan modification applications. Compl. ¶¶ 30-

24 <sup>1</sup> Plaintiffs rely heavily on a California appellate decision, *California Golf, L.L.C. v. Cooper*, 163 Cal. App. 4th 1053 (Cal. App. 2d Dist. 2008). In *California Golf*, however, the state  
 25 appellate court held only that "although the statutory scheme governing nonjudicial foreclosures  
 26 has, in certain circumstances, been held to constitute the exclusive civil remedy for wrongdoing in  
 27 the context of a nonjudicial foreclosure, that exclusivity cannot be applied to immunize the  
 28 fraudulent and apparently felonious conduct of respondents in this case." *Id.* at 1067. In the  
*California Golf* to the instant action is tenuous at best.

1 31. However, Plaintiffs do not state what behavior by each Defendant was deceptive, unfair or  
2 wrongful. Plaintiffs do not tie their allegations to a particular prong of the UCL. Moreover,  
3 Plaintiffs do not allege they were denied a modification on a wrongful or illegitimate basis.  
4 Instead, Plaintiffs merely allege they were denied a loan modification for “failure to meet the Net  
5 Present Value (NPV) test” and declined the opportunity to dispute the NPV calculation. *Id.* at ¶ 28.  
6 These allegations are insufficient to adequately plead a cause of action under the UCL. *See*  
7 *Davenport*, 725 F. Supp. 2d at 878 (granting motion to dismiss UCL claim where plaintiff did not  
8 identify an “unfair business practice” connected to defendants’ loan practices). As with their first  
9 cause of action, Plaintiffs are given leave to amend to allege specific factual allegations that may  
10 form the basis of a legally cognizable UCL claim.

11 **IV. CONCLUSION**

12 For the reasons described above, Defendants’ motion to dismiss is GRANTED WITH  
13 LEAVE TO AMEND. Plaintiffs shall file an amended complaint, if any, within twenty-one (21)  
14 days of this Order to cure the deficiencies identified herein. Plaintiffs may not add new claims or  
15 parties without a stipulation of the parties or leave of the Court pursuant to Federal Rule of Civil  
16 Procedure 15. Failure to timely amend will result in dismissal of Plaintiffs’ claims with prejudice.  
17 The April 21, 2011 motion hearing and case management conference are vacated. Defendants’  
18 motion to strike is DENIED AS MOOT.

19 **IT IS SO ORDERED.**

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21 Dated: April 20, 2011



22 LUCY H. KOH  
23 United States District Judge  
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